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 8 LLC, FORUM DEVELOPERS LIMITED  
 PARTNERSHIP, SIMON PROPERTY GROUP  
 9 LIMITED PARTNERSHIP, AND SIMON  
 PROPERTY GROUP, INC.

11 UNITED STATES DISTRICT COURT  
 12 DISTRICT OF NEVADA

13  
 14 PHASE II CHIN, LLC and LOVE & MONEY,  
 LLC (formerly dba O.P.M.L.V., LLC),

15 Plaintiffs,

16 v.

17 FORUM SHOPS, LLC, FORUM  
 18 DEVELOPERS LIMITED PARTNERSHIP,  
 SIMON PROPERTY GROUP LIMITED  
 19 PARTNERSHIP, SIMON PROPERTY  
 GROUP, INC., CAESARS PALACE CORP.,  
 20 and CAESARS PALACE REALTY CORP.

21 Defendants.

Case No. 2:08-cv-00162-JCM-GWF

**SUPPLEMENTAL MEMORANDUM IN  
 SUPPORT OF MOTION TO DISMISS**

22  
 23 Defendants FORUM SHOPS, LLC, FORUM DEVELOPERS LIMITED  
 24 PARTNERSHIP, SIMON PROPERTY GROUP LIMITED PARTNERSHIP and SIMON  
 25 PROPERTY GROUP, INC. (collectively "Forum Defendants") respectfully submit this  
 26 Supplemental Memorandum in Support of Motion to Dismiss (Docket No. 12).

27 .....  
 28

1       **I. INTRODUCTION**

2           At page 3 of Plaintiffs' Sur-Reply in support of its opposition to Forum Defendants  
3 motion to dismiss Plaintiffs state: "That is precisely what Plaintiffs have alleged occurred in this  
4 case: Defendants -- for racially motivated reasons -- have repeatedly and intentionally interfered  
5 with Plaintiffs' contracts, including the Lease, the Management Agreement, and Plaintiffs'  
6 ability to contract with their customers." [Emphasis added.]

7  
8           This statement is false. The entire sum and substance of the allegations against the  
9 Forum Defendants in the Complaint -- the only conduct they are alleged to have engaged in -- is  
10 the sending of four letters to Chinois constituting notices of default under the Lease. Not only  
11 were these letters absolutely privileged as a matter of law, they did not in any way interfere with  
12 the Lease, the "Management Agreement"/Sublease or "Plaintiffs' ability to contract with their  
13 customers."

14  
15       **II. THE NOTICES OF DEFAULT SENT BY THE FORUM DEFENDANTS TO**  
16 **CHINOIS WERE ABSOLUTELY PRIVILEGED AND CANNOT FORM THE**  
17 **BASIS FOR ANY CLAIM FOR RELIEF.**

18           The conduct of the Forum Defendants alleged by Plaintiffs as the sole basis for all of  
19 their causes of action except their First (declaratory relief), Sixth (breach of contract) and Eighth  
20 (breach of the covenant of good faith and fair dealing) is the sending of four letters notifying  
21 Chinois that it was in breach of the Lease and that its failure to cure would "cause Landlord to  
22 take those steps deemed necessary to protect its interests." The letters went on to state, "These  
23 steps may include, without limitation, termination of the Lease, and commencement of an action  
24 to recover possession of Tenant's Premises as provided in the Lease...." See, e.g., Exhibit D to  
25 Forum Defendants' Motion to Dismiss (Docket No. 12). Following receipt of these letters,  
26 Chinois did not cure the breaches outlined in the letters and, as promised, the Forum Defendants  
27  
28

1 commenced an action against Chinois to recover possession of the Premises.<sup>1</sup>

2 It is well settled that communications associated with the attempted protection or  
3 enforcement of rights related to judicial and quasi-judicial proceedings are absolutely privileged,  
4 meaning that the recipient of such communications cannot use them as a basis for subsequently  
5 asserting claims for relief against the party giving those communications. This is a long-standing  
6 common law principal often referred to as the "litigation privilege." *Crockett & Myers, Ltd.*  
7 *Napier, Fitzgerald & Kirby, LLP*, 440 F. Supp. 2d 1184, 1195-96 (Nev. 2006).

9 Nevada recognizes "the long-standing common law rule that  
10 communications uttered or published in the course of judicial proceedings are  
11 absolutely privileged." *Fink v. Oshins*, 118 Nev. 428, 49 P.3d 640, 643 (2002)  
12 (quoting *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 657 P.2d 101, 104  
13 (1983)). Generally, absolute privileges apply in situations where it is in the public  
14 interest that a person speak freely, even if from time to time some individuals may  
15 abuse the privilege. *Hampe v. Foote*, 118 Nev. 405, 47 P.3d 438, 440 (2002).  
16 "An absolute privilege is an immunity, which protects against even the threat that  
17 a court or jury will inquire into a communication." *Id.* The absolute privilege for  
18 communications related to judicial proceedings is based on the policy that as  
19 officers of the court, attorneys ought to have "the utmost freedom in their efforts  
20 to obtain justice for their clients." *Fink*, 49 P.3d at 643 (quotation omitted).

21 Whether the absolute privilege applies is a question for the court. *Id.* at  
22 643-44. The absolute privilege's scope is "quite broad," and only need be "in  
23 some way pertinent to the subject of controversy." *Id.* at 644 (quotation omitted).  
24 Nevada has directed courts to apply the absolute privilege "liberally, resolving  
25 any doubt in favor of its relevancy or pertinency." *Id.* (quotation omitted).

26 Nevada has applied the absolute privilege related to judicial proceedings  
27 primarily in defamation actions, but has extended its application to other causes of  
28 action which derivatively depend upon the alleged defamation. *See Fink*, 49 P.3d  
at 643 (defamation); *Knox v. Dick*, 99 Nev. 514, 665 P.2d 267 (1983) (defamation  
and intentional infliction of emotional distress); *Sahara Gaming Corp. v. Culinary  
Workers Union Local 226*, 115 Nev. 212, 984 P.2d 164 (1999) (civil conspiracy,  
interference with contract, and interference with prospective economic damage  
which were derivative of defamation claim).

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29 Nevada affords the absolute privilege for communications associated with  
30 judicial proceedings broad scope and directs courts to apply that privilege  
31 liberally.

32 <sup>1</sup> *Forum Shops, LLC v. Chin-LV, LLC*, Case No. 07C-10-0330 CLS, filed October 3,  
2007, pending in the Superior Court of the State of Delaware in and for New Castle County. A  
copy of the Complaint for Declaratory Judgment (*sans* exhibits) is attached as Exhibit E to the  
Forum Defendants' Motion to Dismiss (Docket No. 12).

1 *Id.* at 1195-96 (emphasis added).

2 Letters written to protect or assert legal rights are a necessary part of the judicial process.  
3 *Richards v. Conklin*, 94 Nev. 84, 85, 575 P.2d 588, 589 (1978) (“the letters in question were  
4 written to protect the interest of respondents’ clients in both a continuing and anticipated judicial  
5 proceeding and the letters were, therefore, subject to both an absolute and qualified privilege”).  
6 *Blanchard v. DirecTV, Inc.*, 123 Cal. App. 4<sup>th</sup> 903, 919, 20 Cal. Rptr. 3d 385, 396 (Cal. App.  
7 2004) (“It has long been the law that communications that bear ‘some relation’ to an anticipated  
8 lawsuit fall within the privilege”). In many instances, such letters are a necessary prerequisite to  
9 bringing a judicial action to enforce legal rights. In the instant case, under the terms of the  
10 Lease, the Forum Defendants were required to give formal notice of the breaches committed by  
11 Chinois’ and to give Chinois an opportunity to cure those breaches before any judicial action  
12 could be taken. Accordingly, those letters were absolutely privileged and cannot form the basis  
13 of any claim for relief against the Forum Defendants. *See 1100 Park Lane Associates v.*  
14 *Feldman*, 160 Cal. App. 4<sup>th</sup> 1467, 1488, 74 Cal. Rptr. 3d 1, 18 (Cal. App. 2008) (notice to quit  
15 served on a tenant prior to commencement of an unlawful detainer action was absolutely  
16 privileged requiring dismissal of tenant’s claims for retaliatory eviction, wrongful eviction,  
17 negligence, negligent misrepresentation, breach of contract, unfair business practices and breach  
18 of the covenant of quiet enjoyment).<sup>2</sup>

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20  
21 **III. CONCLUSION**

22 For the foregoing reasons, the letters sent by Forum Defendants to Chinois notifying  
23 Chinois that it was in breach of the Lease and that Chinois would be sued if the breaches were  
24

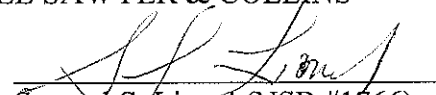
25  
26 <sup>2</sup> In their Joint Sur-Reply to Motion to Dismiss (Docket No. 43), Chinois argues that the  
27 Forum Defendants have failed to cite authority for the proposition that Chinois cannot maintain  
28 an action for breach of the covenant of quiet enjoyment so long as Chinois remains in possession  
of the premises. As held by the court in *1100 Park Lane Associates, supra*, where, as here, the  
cause of action is based solely on the giving of a notice of default -- which is absolutely  
privileged -- it must be dismissed.

1 not cured were absolutely privileged. Because these letters constitute the only conduct of the  
2 Forum Defendants forming the basis for Plaintiffs' Second Cause of Action (interference with  
3 contractual relations), Third Cause of Action (interference with prospective business advantage),  
4 Fourth Cause of Action (injunctive relief), Fifth Cause of Action (violation of 42 U.S.C. § 1981)  
5 and Seventh Cause of Action (conspiracy) these claims must be dismissed as a matter of law.  
6 *See Sahara Gaming Corp. v. Culinary Workers Union Local*, 226, 115 Nev. 212, 984 P.2d 164  
7 (1999) (dismissing claims for civil conspiracy, interference with contract and interference with  
8 prospective economic damage based on communications protected by the litigation privilege).  
9

10 Respectfully submitted,

11 LIONEL SAWYER & COLLINS

12 By:

  
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